APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

01-3315

JANE S. WEAVER,

Petitioner,

v.

DEPARTMENT OF JUSTICE,

Respondent.

Decided: May 14, 2002

Before MAYER, *Chief Judge*, NEWMAN and CLEVENGER, *Circuit Judges*.

PER CURIAM.

Jane S. Weaver seeks review of the decision of the Merit Systems Protection Board, No. DC 1221000535W-1 (May 14, 2001), dismissing her individual right of action ("IRA") appeal for lack of jurisdiction. We *affirm*.

Weaver was employed as a trial attorney at the Department of Justice ("DOJ"). In June of 1997, she entered into a settlement agreement with DOJ resolving disputed issues over her placement in a performance improvement program and denial of a within-grade increase. Pursuant to the terms of the settlement agreement, Weaver resigned, and later was given a temporary appointment in the U.S. Attorneys Office for a set period. After the expiration of the set period, she was placed on administrative leave for ninety-days and then

separated from federal service effective March 2, 1998. In September of 1999, Weaver filed a complaint with the Office of Special Counsel ("OSC") alleging that DOJ had retaliated against her for disclosing fraud, waste, and mismanagement. OSC informed her that it had terminated its inquiry into her allegations and would take no further action. Weaver appealed to the board.

We must affirm the final decision of the board unless we determine that it is "(1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) obtained without procedures required by law, rule, or regulation having been followed; or (3) unsupported by substantial evidence." 5 U.S.C. § 7703(c) (2000).

We review the board's decision regarding its own jurisdiction de *novo*. *King v. Briggs*, 83 F.3d 1384, 1387 (Fed. Cir. 1996). The board has jurisdiction over an IRA appeal if the appellant has exhausted her administrative remedies before OSC and makes "non-frivolous allegations" that she engaged in whistleblowing activity by making a protected disclosure under 5 U.S.C. § 2302(b)(8), and the disclosure was a contributing factor in the agencys decision to take or fail to take a personnel action as defined by 5 U.S.C. § 2302(a). *Yunus v. Dept of Veterans Affairs*, 242 F.3d 1367, 1371 (Fed. Cir. 2001).

Weaver asserts that the board has jurisdiction over her IRA appeal because several DOJ components and other federal agencies refused to hire her because of her whistleblowing activity. By refusing to disclose the basis for her alleged whistleblowing to OSC, however, Weaver failed to exhaust her administrative remedies because she rendered it impossible for OSC to take action. And her reliance on OSCs termination of investigation letter to establish board jurisdiction is without merit.

Weaver also asserts that the board erred by not affording her a hearing on the voluntariness of her resignation. She contends that her settlement agreement with DOJ is invalid because her signature was obtained through coercion and misrepresentation. Weaver did not present a *prima facie* case that her June 3, 1997, settlement and resignation were involuntary. Moreover, Weaver, a licensed attorney, submitted no evidence showing that she was unable to understand the nature of the agreement or that her decision to enter into the agreement was uninformed.

We have considered the remainder of Weaver's individual right of action, constructive discharge, and constitutional arguments and find them unpersuasive.

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

01-3315

JANE S. WEAVER,

Petitioner,

v.

DEPARTMENT OF JUSTICE,

Respondent.

ORDER

A combined petition for panel rehearing and tor rehearing en banc having been filed by the PETITIONER, and a response thereto having been invited by the court and filed by the RESPONDENT, and the petition for rehearing having been referred to the panel that heard the appeal, and thereafter the petition for rehearing en banc and response having been referred to the circuit judges who are in regular active service,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for panel rehearing be, and the same hereby is, DENIED and it is further

ORDERED that the petition for rehearing en banc be, and the same hereby is, DENIED.

The mandate of the court will issue on August 15, 2002.

FOR THE COURT,

/s/ Jan Horbaly
JAN HORBALY Clerk

Dated: August 8, 2002

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

DOCKET NUMBER
DC-122 1-00-0535-W-1

JANE S. WEAVER,
Appellant,

v.

DEPARTMENT OF JUSTICE,
Agency.

Date: May 14, 2001

Jane S. Weaver, Arlington, Virginia, *pro se*.

Timothy Zick, Esquire, Washington, D.C., for the agency.

BEFORE

Beth S. Slavet, Chairman
Barbara J. Sapin, Vice Chairman
Susanne T. Marshall, Member

FINAL ORDER

The appellant has filed a petition for review in this case asking us to reconsider the initial decision issued by the administrative judge. We grant petitions such as this one only when significant new evidence is presented to us that was not available for consideration earlier or when the administrative judge made an error interpreting a law or regulation. The

regulation that establishes this standard of review is found in Title 5 of the Code of Federal Regulations, section 1201.115(5 C.F.R. § 1201.115).

After fully considering the filings in this appeal, we conclude that there is no new, previously unavailable, evidence and that the administrative judge made no error in law or regulation that affects the outcome. 5 C.F.R. § 1201.115(d). Therefore, we DENY the petition for review. The initial decision of the administrative judge is final. This is the Boards final decision in this matter. 5 C.F.R. § 1201.113.

NOTICE TO THE APPELLANT REGARDING YOUR FURTHER REVIEW RIGHTS

You have the right to request the United States Court of Appeals for the Federal Circuit to review this final decision. You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after your receipt of this order. If you have a representative in this case, and your representative receives this order before you do, then you must file with the court no later than 60 calendar days after receipt by your representative. If you choose to file, be very careful to file on time. The court has held that normally it does not have the authority to waive this statutory deadline and that filings that do not comply with the deadline must be dismissed. *See Pinat v. Office of Personnel Management*, 931 F.2d 1544 (Fed. Cir. 1991).

If you need further information about your right to appeal this decision to court, you should refer to the federal law that

gives you this right. It is found in Title 5 of the United States Code, section 7703 (5 U.S.C. § 7703). You may read this law as well as review other material at our web site, http://www.mspb.gov.

FOR THE BOARD: /s/ Robert E. Taylor
ROBERT E. TAYLOR
Clerk of the Board

Washington, D.C.

UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD
WASHINGTON REGIONAL OFFICE

DOCKET NUMBER
DC-1221-00-0535-W-1

JANE S. WEAVER,
Appellant,

v.

DEPARTMENT OF JUSTICE,
Agency.

DATE: July 6, 2000

Jane S. Weaver, Arlington, Virginia, pro se.

Timothy Zick, Esquire, Washington, DC, for the agency.

BEFORE
Sherry A. Armstrong
Administrative Judge

INITIAL DECISION

On May 21, 2000, the appellant filed an individual right of action (IRA) appeal alleging that she had been constructively removed and that the agency had taken several other actions which she asserted were due to reprisal for alleged whistleblowing activity. For the reasons set forth below, the appeal is DISMISSED.

BACKGROUND

The appellant was employed in the position of Trial Attorney, GS-0905-13, in the Fraud Section of the Criminal Division at the U.S. Department of Justice (DOJ or agency) in Washington, D.C. Agency File (Ag. File), Tab 4A. On December 3, 1996, an attorney representing the appellant at that time, Michael J. Kator, Esq., informed the agency that he was representing the appellant in regard to "employment issues" including the appellant's placement in a performance improvement program and her denial of a within-grade increase. Ag. File, Tab 4P. The parties immediately began negotiating a settlement agreement. Ag. File, Tabs 4L through 40. The appellant subsequently terminated her relationship with Mr. Kator on June 2, 1997. Ag. File, Tab 4J. Nonetheless, on June 3, 1997, she entered into a settlement agreement with the agency resolving the disputed issues. Ag. File, Tab 4H. Pursuant to the terms of the settlement agreement, the appellant resigned her employment with the agency. Ag. File, Tabs 4H and 4I. She was then given, *inter alia*, a temporary appointment and was detailed to the U.S. Attorney's Office for a set period. Ag. File, Tab 4H. The detail was not extended and, pursuant to the terms of the settlement agreement, the appellant was placed in administrative leave status for a 90-day period and was subsequently separated from Federal service effective March 2, 1998, and pursuant to the terms of the settlement agreement. Ag. File, Tabs 4A, 4H, and 4I.

On or about September 1, 1999, the appellant filed a complaint with the Office of Special Counsel (OSC) alleging that the agency had retaliated against her for disclosing fraud, waste, and mismanagement within the agency. Appeal File (AF), Tabs 9 and 11. On March 10, 2000, OSC informed the appellant that it had terminated its inquiry into her allegations and would take no further action. AF, Tab 1. OSC advised the appellant that she may have the right to seek corrective action from the Board. *Id.*

On May 21, 2000, the appellant filed an appeal with the Board summarily alleging that she had been subjected to reprisal for protected activity based on an alleged involuntary resignation and other agency actions. *Id.* By orders dated May 22, 2000, and June 6, 2000, the appellant was provided information regarding the burdens of proof applicable to both an appeal of a constructive removal and for an Individual Right of Action (IRA) appeal. AF, Tabs 2 and 4. By motion dated June 6, 2000, the agency advised the Board that the appellant had resigned pursuant to a settlement agreement. AF, Tab 5. Accordingly, by order dated June 7, 2000, the appellant was advised of the burden of proof applicable to a parties' attempt to set aside a settlement agreement. AF, Tab 6.

The appellant filed several responses to the Board's orders and her responses have been fully considered. AF, Tabs 3, 9, 11, and 13. In general, she asserted that she made protected disclosures which resulted in several personnel actions including, inter alia, constructive removal, threats of an adverse action, denial of a detail, denial of a step increase, poor performance evaluations, a reprimand, implementation of a performance improvement plan (PIP), removal of work assignments, assignment of work duties normally performed by subordinate employees, removal of a computer, limited agency access, and failure to hire by other DOJ departments and federal agencies. AF, Tabs 1, 3 and 9. Because it could not be determined from her two initial submissions whether she had fulfilled the statutory requirement that she exhaust remedies through OSC before filing an IRA appeal with the Board, the appellant was again informed of that requirement and was ordered to submit additional documentation. AF, Tab 10. The agency subsequently filed a motion to dismiss this appeal for lack of jurisdiction. AF, Tab 12. The appellant filed an objection to that motion. AF, Tab 13.

ANALYSIS AND FINDINGS

The existence of Board jurisdiction is a threshold issue in adjudicating an appeal, and the appellant bears the burden of establishing jurisdiction by a preponderance of the evidence. 5 C.F.R. § 1201.56(a)(2)(i). *See Covington v. Department of the Army*, 85 M.S.P.R. 612, 618 (2000). In order to obtain a hearing on a jurisdictional issue, the United States Court of Appeals for the Federal Circuit and the Board have held that an appellant is required to make a nonfrivolous allegation of jurisdiction. *See Dumas v. Merit Systems Protection Board*, 789 F.2d 892, 894 (Fed.Cir.19S6); *Burgess v. Merit Systems Protection Board*, 758 F.2d 641, 643 (Fed.Cir.1985); *Schmidt v. U.S. Postal Service*, 39 M.S.P.R. 188, 192 (1988). Nonfrivolous allegations of Board jurisdiction are allegations of fact which, if proven, could establish a prima facie case that the Board has jurisdiction over the matter in issue. *See Dumas*, 789 F.2d at 894. In determining whether the appellant has made a nonfrivolous allegation of jurisdiction entitling him to a hearing, an administrative judge may consider an agency's documentary submissions. *See Dumas*, 789 F.2d at 894; *Manning*, 742 F.2d at 1428; *Ferdon v. U.S. Postal Service*, 60 M.S.P.R. 325, 329 (1994). However, to the extent that the agency's evidence constitutes mere factual contradiction of an appellant's otherwise adequate prima facie showing of jurisdiction, the administrative judge may not weigh evidence and resolve conflicting assertions of the parties. *Id.*

The appellant has not presented a prima facie case that the settlement agreement is invalid.

As noted above, on June 3, 1997, the appellant entered into a settlement agreement with the agency. Ag. File, Tab 4H. The agreement provided, *inter alia*, as follows:

> Ms. Weaver agrees to withdraw all appeals or complaints against the U.S. Department of Justice or any

> Department of Justice employees pending in any forum including, but not limited to the EEOC, MSPB, FLRA, the Office of Special Counsel, Federal court, state court, arbitrators, or grievance procedures. Ms. Weaver further agrees not to file any claims in any forum, including but not limited to EEOC, MSPB, the Office of Special Counsel, arbitrators or courts, against the Department of Justice or its employees (other than an action to enforce this agreement) that arose out of her employment with the Department of Justice up to the date of this agreement. Ms. Weaver also agrees not to claim before the EEOC, MSPB, the Office of Special Counsel, arbitrators and courts, that the Agency engaged in any illegal or improper conduct (including but not limited to prohibited personnel practices or employment discrimination) involving Ms. Weaver up to the date of this agreement. Ms. Weaver agrees to withdraw any such claim that she may have already filed in any such forum.

Ag. File, Tab 4H, Paragraph 10.

With the exception of claims regarding employment references or failure to hire by DOJ departments or other Federal agencies, it is clear that the remainder of the alleged agency actions challenged by the appellant did, in fact, arise out of her employment with the agency up to the date of the agreement. Moreover, with the same exception, it is clear that the appellant is attempting to assert before the Board, as she did before OSC, that the agency engaged in illegal or improper conduct, including prohibited personnel practices, which involve circumstances occurring up to the date of the agreement. However, the terms of the agreement, as quoted above, clearly provides that the appellant waived appeal rights in any forum, including OSC and the Board, for such actions. *Id.*

The Board has the authority to consider a settlement agreement that the parties entered into in proceedings not

before the Board so as to determine its effect on a personnel action before the Board. *See Covington*, 85 M.S.P.R. at 618-19. *See also, e.g., Sullivan v. Department of Veterans Affairs*, 79 M.S.P.R. 81, 84 (1998) (settlement of an EEOC complaint); *Laity v. Department of Veterans Affairs*, 61 M.S.P.R. 256, 261 (1994) (settlement of a grievance). However, to the extent that the appellant is attempting to repudiate the settlement agreement, I note that the Board has no authority to enforce or invalidate a settlement agreement that has not been incorporated into the record of a Board appeal of an action over which the Board has jurisdiction. *See Kreusch v. U.S. Postal Service*, 85 M.S.P.R. 125, 127 (2000); *Diamond v. U.S. Postal Service*, 51 M.S.P.R. 448, 450 (1991), *aff'd*, 972 F.2d 1353 (Fed.Cir.1992) (Table). The Board, however, may examine the circumstances surrounding the settlement agreement in considering whether it was coerced and, accordingly, whether the waiver of appeal rights should be enforced. *See Danelishen v. U.S. Postal Service*, 43 M.S.P.R. 376, 380 (1990).

The Board and the Federal Circuit have long held that, where an appellant specifically and unambiguously waives their appeal rights in a settlement agreement, it is enforceable and not against public policy if the terms of the waiver are comprehensive, freely made, and fair, and the execution of the waiver was not the result of duress or bad faith on the part of the agency. *See, e.g., McCall v. U.S. Postal Service*, 839 F.2d 664, 666-67 (Fed.Cir.1988); *See Laity*, 61 M.S.P.R. at 261-62; *Merriweather v. Department of Transportation*, 59 M.S.P.R. 434, 437 (1993). Further, if a settlement agreement provides that it fully resolves any and all matters related to employment up to the date of the agreement, as is the case here, then the agreement is binding over all issues which were actually addressed by the agreement as well as those related in any way to the appellant's employment. *Id.* at 263. In *Laity*, the Board held that "[p]articularly since the whistle-blower reprisal claim could have been raised in the grievance,

it is reasonable to infer that such a claim, at a minimum, was among the matters and issues contemplated by the parties in agreeing to waive 'any and all' matters and issues." *Id.* Thus, in this case, if the settlement agreement is valid, it appears clear that the appellant has waived her right to appeal any actions which could have been brought against the agency up to execution of the settlement agreement.

It is well settled that a party attacking a settlement agreement bears a heavy burden to showing that the contract she made is tainted with invalidity, either by fraud practiced upon her or by a mutual mistake under which both parties acted. *See Asberry v. U.S. Postal Service*, 692 F.2d 1378, 1380 (Fed.Cir.1982; *Dickson v. General Services Administration*, 85 M.S.P.R. 7, 10 (1999); *Cassidy v. U.S. Postal Service*, 65 M.S.P.R. 86, 90 (1994); *Hazlett v. Department of Justice*, 25 M.S.P.R. 623, 625 (1985). The appellant was advised of the burden of proof applicable to setting aside a settlement agreement and was provided the opportunity to show cause why the settlement agreement should not be enforced. AF, Tab 6.

In her response, the appellant cited several court cases as well as the Restatement of Contracts (Second) supporting her assertion that contracts tainted by mistake, duress, or fraud are voidable at the option of the innocent party. AF, Tab 9, citing *Oubre v. Entergy Operations*, 522 U.S. 422, 427 (1998), and *T Brown Construction, Inc. v. Pena*, 132 F.3d 724, 729 (1997). However, these cases merely restate the Board law. The principles contained there are not challenged. Nonetheless, it remains the appellant's burden to establish that such mistake, fraud, or duress occurred.

In her response, as grounds for showing the settlement agreement to be invalid, the appellant stated that she was not represented at the time she executed the agreement. AF, Tab 9. However, lack of representation does not establish that a settlement agreement was coerced. *See Wade v. Department*

of Veterans Affairs, 61 M.S.P.R. 580, 584 (1994). The Board has held that parties to a settlement agreement are presumed to have full legal capacity to contract unless they are under guardianship, an infant, mentally ill or defective, or intoxicated. *Id. See also Ray v. Department of Health & Human Services*, 57 M.S.P.R. 16, 20 (1993). The appellant, a licensed attorney, does not assert that she lacked full legal capacity to enter into the settlement agreement nor has she submitted any evidence showing that she was unable to understand the nature of the settlement agreement or that her decision was not an informed one. *See Wade*, 61 M.S.P.R. at 584; *Riley v. Department of the Army*, 55 M.S.P.R. 671, 677 (1992). Moreover, the appellant was represented by an attorney until one day prior to execution of the settlement agreement.[1] Ag. File, Tab 4F. Several drafts were prepared by the agency and appellant's former counsel over a period of about four months. Ag. File, Tabs 4H, 4L, 4M, 4Q. The draft agreements, found at Ag. File, Tabs 4L, 4M, and 4O, are very similar in language to the final agreement. Ag. File, Tab 4H. Thus, it is clear that the appellant was represented for the bulk of the settlement negotiations which occurred over a four month period. Consequently, it appears that the settlement agreement was carefully negotiated between the appellant or her chosen representative and the agency and, thus, there is no indication from this evidence that the settlement agreement was involuntary.[2] *See, e.g., Frizzell v. Department of the*

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[1] I note that the letter dismissing appellant's counsel is dated June 2, 1996. Ag. File, Tab 4J. The year, 1996, is clearly a typographical error as the other evidence of record clearly indicates that Michael Kator, appellant's counsel, was engaged in representation up until June 2, 1997. *See, e.g.*, Ag. File, Tabs 4L through 4Q.

[2] Further, although the appellant asserts that her attorney demonstrated "negligence and malfeasance" in his representation, AF, Tab 13, an appellant is bound by the actions of their freely chosen representative. *See Covey v. Department of the Air Force*, 53 M.S.P.R. 367, 372 (1992); *Randolph v. Office of Personnel Management*, 33 M.S.P.R. 323, 325

Air Force, 53 M.S.P.R. 413, 415 (1992) (Board found no merit to appellant's argument that he had insufficient time to consider agreement where settlement negotiations occurred over a period of approximately one month); *Office of Special Counsel v. Jennings*, 44 M.S.P.R. 1, 4 (1990) (lack of coercion found where agreement was negotiated over approximately a two month period provided the appellant with adequate time to determine the impact of the agreement on his career or to request additional time to do so).

The appellant also stated that she relied on an agency official's multiple oral and written misrepresentations when she signed the agreement. AF, Tabs 9 and 13. However, the appellant identified only one alleged oral misrepresentation. She asserted that Sandra Bright, an agency official, promised her that she would secure permanent employment for the appellant within the agency if she would sign the agreement. AF, Tab 9, at Timeline, Page 8, and AF, Tab 13. This alleged misrepresentation would not be reviewable by the Board. The appellant does not dispute that the language of the agreement is clear on the issue of her continued employment with the agency. There is nothing in the agreement guaranteeing the appellant a position with the agency and, in fact, the agreement clearly specifies that the appellant would be given a temporary appointment, not to exceed 410 days, which "cannot and will not be extended for any reason." Ag. File, Tab 4H, Paragraph 2. It further provides that the appellant would be detailed to a position in the U.S. Attorney's Office which may be terminated at any time. *Id.* at Paragraph 3 and 4. Should the detail be terminated, the agreement clearly provides that the appellant would be returned to a position in the criminal division for a period of 90 days from the termination of the detail if terminated in six months or less, or

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(1988). Nonetheless, in this case, the appellant signed the agreement after terminating her attorney-client relationship and, thus, is solely responsible for her actions.

for a period of 45 days if the detail is terminated after more than six months. Id. at Paragraph 4. The agreement further states that:

> [a]t the end of 90 or 45 days, whichever applies, the temporary appointment will end and Ms. Weaver will be separated from the Federal Service. It is agreed that such a separation may not be appealed by Ms. Weaver in any forum for any reason. Upon the termination of the detail, the Agency shall use its best efforts to place Ms. Weaver in a position within the Criminal Division or else in the Department of Justice, where she will have a legitimate opportunity to prove herself and secure continued employment.

Id. Based on all the provisions cited herein, the agreement's language is clear that the appellant expressly would not be provided continued employment with the agency. *Id.* There is no ambiguity on this issue. It is well-settled that, in interpreting a settlement agreement, where the terms of an agreement are unambiguous, the intent of the parties is determined from the plain words of the agreement and parole evidence is not considered. *See Amos v. U.S. Postal Service*, 84 M.S.P.R. 186, 189 fn. 2 (1999); *Greco v. Department of the Army*, 852 F.2d 558, 560 (Fed..Cir.1988). Consequently, the appellant's parole evidence and argument that she may have signed the agreement despite this alleged misrepresentation by an agency official would not be admissible before the Board. *Id.*

Relying on *Covington*, the appellant argues that the settlement agreement is invalid because she was accused of no misconduct or malfeasance prior to her alleged whistleblowing and thus could not have been removed.[3] AF,

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[3] In *Covington*, the Board held that, where an appellant raises a nonfrivolous factual issue of compliance with a settlement agreement which contains a waiver of appeal rights, the Board must resolve that issue before addressing the scope and applicability of a waiver of appeal

Tab 9. The Board and the courts have long held that an appellant may demonstrate that a settlement agreement was coerced, and thus, involuntary, by showing that the agency threatened to take a future disciplinary action that it knew or should have known could not be substantiated. *See Schultz v. U.S. Navy*, 810 F.2d 1133, 1136 (Fed.Cir.1987); *Fassett v. U.S. Postal Service*, 85 M.S.P.R. 677, 679 (2000). Such is not the case here. There was no proposed adverse action and, in fact, the appellant initially hired an attorney to address many issues with the agency, including, inter alia, a reprimand and negative performance appraisal. The settlement agreement resolved those issues to the appellant's benefit.

I note that the signed agreement provides that it was freely and voluntary executed by the parties. Ag. File, Tab 4H. Further, although the appellant alleges that she received no consideration for executing the agreement, her representation is simply erroneous. AF, Tab 13. Pursuant to the agreement, the agency, *inter alia*, withdrew a negative performance appraisal and agreed not to conduct any appraisals for a certain period where the appellant's performance was disputed such that her rating for the period would be "presumptively fully successful." *Id.* at Paragraph 5. The

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rights in the agreement. *See Covington*, 85 M.S.P.R. at 620, *citing McCall*, 839 F.2d at 667-68. In this case, the appellant has made no specific arguments that the agency failed to comply with the agreement but, rather, she asserts that it should not be enforced because it was coerced. I note that there was a sentence in an attachment to the appellant's response which did assert that DOJ failed to comply with the agreement. It was contained in a letter from the appellant to OSC, dated February 9, 2000, in which the appellant summarily stated that the agency failed to comply with the agreement. AF, Tab 9. However, this summary statement is insufficient and the appellant has failed to provide any nonfrivolous allegations supported by facts which, if proven, would form the basis for Board jurisdiction over this appeal. *See, e.g., Langston v. Department of the Army*, 84 M.S.P.R. 597, 600-60 1 (1999) (bare allegations are insufficient to establish noncompliance with settlement agreement).

agency granted the appellant a within-grade increase and agreed to expunge a reprimand and other negative material in her Official Personnel File related to denial of a within-grade increase, placement on a PIP, and an unsatisfactory performance appraisal. *Id.* at Paragraphs 6 and 7. In addition, pursuant to the agreement, the agency paid $6000 to the appellant's attorney. *Id.* at Paragraph 11. See also Ag. File, Tab 4D. The appellant apparently accepted these and other benefits of the settlement agreement immediately upon execution but she made no attempt to set aside the settlement agreement as involuntary until filing a complaint with OSC on or about September 1, 1999—more than two years and two months after execution of the settlement agreement.[4] AF, Tabs 9 and 11. *See Biberstine v. Department of Defense Dependents Schools*, 37 M.S.P.R. 248 (1988) (appellant's failure to raise claims of coercion until almost two months after execution of settlement agreement detracts from "credibility and plausibility" of his argument that he was coerced into settlement); *Lang v. U.S. Department of Agriculture*, 35 M.S.P.R. 314 (1987). These undisputed facts all belie the appellant's assertions that the settlement agreement was involuntary.

Finally, I note that the appellant provided many examples of alleged harassment occurring during her tenure at the agency. AF, Tabs 1, 3, 9, 11, and 13. However, they all relate to the term of her employment and not to the circumstances

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[4] The appellant asserts that she did contact the agency in December of 1997 and in January of 1998 regarding their efforts to comply with the agreement. AF, Tab 13. She also asserts that she contacted her former attorney in March of 1998 and the unemployment compensation offices in Virginia and the District of Columbia in April of 1998. *Id.* However, the appellant still made no efforts to contest the settlement agreement as involuntary until September of 1999. Moreover, even if her contacts with the agency in December of 1998 were indicative of efforts to set aside the agreement, these contacts still occurred more than one and one-half years after execution of the settlement agreement.

surrounding the settlement agreement. *See Landreville v. Department of Health & Human Services*, 63 M.S.P.R. 282, 284 (1994) (allegations of harassment which do not relate to negotiation of the settlement agreement do not provide evidence of coercion).

For all of the reasons cited above, despite the appellant's conclusory allegations that the settlement agreement is invalid because it was the result of misrepresentation, fraud, or duress, the appellant has presented no facts which, if proven, would establish that the settlement agreement was involuntary. Accordingly, the waiver of appeal rights contained therein should be given full effect. Thus, I find that the appellant waived any appeal rights to the Board in the settlement agreement and thus the Board lacks jurisdiction to review any allegations concerning employment issues which could have been brought prior to the date of the agreement.

The Board lacks jurisdiction over the appellant's allegations of constructive removal.

The appellant alleges that some retaliatory actions were taken after execution of the settlement agreement. With the exception of the issue of her constructive removal, the remainder of those allegations will be addressed below. However, in regard to her allegations of constructive removal, it is accurate that the appellant's separation from Federal service occurred on March 2, 1998, after execution of the settlement agreement in June of 1997. Ag. File, Tab 4A and 4H. Generally, an employee-initiated action, such as a resignation, is presumed to be voluntary unless the appellant presents sufficient evidence to establish that the action was obtained through duress or coercion or shows that a reasonable person would have been misled by the agency. *Id. See also Koop v. Federal Emergency Management Agency*, 16 M.S.P.R. 605, 607 (1983). In this case, however, the appellant's resignation was tendered on the date that the settlement agreement was signed. Ag. File, Tab 4I. The

resignation was offered pursuant to the terms of the settlement agreement which, as discussed above, provided that the appellant waived appeal rights in all other forums. Ag. File, Tab 4H. The appellant's subsequent termination following cessation of the detail discussed above was also taken pursuant to the terms of the settlement agreement. *Id.* As discussed at length above, the appellant has not made a prima facie case that the settlement agreement with its included waiver provisions should he set aside as invalid. Accordingly, the issue of alleged constructive removal is not within the Board's jurisdiction.

Assuming, *arguendo*, that the Board's jurisdiction over this issue is not foreclosed by the settlement agreement, it could also not be considered in an IRA appeal. As the appellant was advised, AF, Tab 4, IRA jurisdiction attaches, *inter alia*, when the agency took or failed to take, or threatened to take or fail to take, a "personnel action" listed at 5 U.S.C. § 2302(a)(2)(A). *See Shelley*, 75 M.S.P.R. at 413-14; *Geyer v. Department of Justice*, 63 M.S.P.R. 13, 16-17 (1994); *Zimmerman v. Department of Housing & Urban Development*, 61 M.S.P.R. 75, 83 (1994); *Duda v. Department of Veterans Affairs*, 51 M.S.P.R. 444, 446 (1991). However, the Board has previously held that a voluntary resignation is not a "personnel action" as defined in section 2302(b)(8) and, thus, that such an appeal is not within the Board's IRA authority. *See Shelley v. Department of Transportation*, 75 M.S.P.R. 411, 413-14 (1997). Consequently, the constructive removal allegation is not within the Board's jurisdiction as an IRA appeal. *Id. See also* 5 U.S.C. § 2302(a)(2)(A).

The appellant has failed to establish that the Board has jurisdiction over an IRA appeal.

As noted above, the appellant alleges that other purported personnel actions occurred subsequent to execution of the settlement agreement. In particular, she asserts that other departments within the Department of Justice as well as other

Federal agencies rejected her employment applications and, thus, she implies that the agency must be providing information which is contributing to her inability to secure Federal employment.[5] AF, Tab 3. The appellant also asserts that agency departments and other Federal agencies failed to hire her due to her whistleblowing activity. *Id.* For the reasons discussed below, these allegations are not within the Board's jurisdiction as an IRA appeal.

An employee may file an IRA appeal to the Board from an agency personnel action alleged to have been proposed, taken, or not taken because of whistleblowing activities. 5 U.S.C. § 1214(a)(3); 5 C.F.R. § 1209.2. In order to establish Board jurisdiction over an IRA appeal, an appellant must show that she engaged in whistleblowing activity, that she was subjected to a "personnel action" as defined at 5 U.S.C. § 2302(a)(2)(A), and that she engaged in protected activity, raised a specific claim of reprisal regarding the alleged actions to the OSC and that proceedings before OSC have been exhausted. *See White v. Department of the Air Force*, 63 M.S.P.R. 90, 94 (1994); *Geyer*, 63 M.S.P.R. at 13. To establish that the appellant had a reasonable belief that a disclosure met the criteria of 5 U.S.C. § 2302(b)(8), she need not prove that the condition disclosed actually established gross mismanagement, or violations of law, rule and regulation as detailed under 5 U.S.C. § 2302(b)(8)(A)(ii); rather, the appellant must show that the matter disclosed was one which a reasonable person in her position would believe evidenced any of the situations specified in 5 U.S.C. § 2302(b)(8). *See Geyer*, 63 M.S.P.R. at 17.

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[5] The appellant appeared to imply that she may bring actions against other Federal agencies for their failure to hire her which she contends is based on her whistleblowing activity. AF, Tab 9. However, the appellant has filed no Board appeals against any agency other than the Department of Justice.

First, in regard to the appellant's inference that the agency is providing negative information to other agency departments and other Federal agencies such that the appellant has not been appointed to a Federal position, I note that the appellant has presented nothing more than bare allegations that the agency is providing such information to other agency offices and Federal agencies. The appellant provides no facts which, if proven, would establish that the agency's alleged actions occurred. *See Godfrey v. Department of the Air Force*, 45 M.S.P.R. 293, 303 (1990) (an IRA appeal must be based on a threatened, proposed, or not-taken "personnel action," and not based solely on generalized assertions and fears unsupported by reference to any specific action). The appellant relies only on the fact that she has been unable to obtain Federal employment. In addition, the appellant indicated in several instances that disclosures regarding her whistleblowing activity to a prospective employer were made by the appellant herself. AF, Tabs 3 and 9. Further, the appellant has identified no authority on which to find that a negative employment reference or negative information provided to other departments or agencies is a "personnel action" as defined by 5 U.S.C. § 2302(a)(2)(A).

I note that the statutory definition of a "personnel action" does include actions involving an "appointment." 5 U.S.C. § 2302(a)(2)(A)(i). Consequently, the agency's alleged failure to hire the appellant for Federal employment due to protected activity would be a protected personnel action. However, as discussed below, the appellant has failed to satisfy the exhaustion requirement for an IRA appeal.

As cited above, the appellant must establish that she raised a specific claim of reprisal regarding the alleged actions to OSC and that proceedings before OSC have been exhausted. 5 U.S.C. § 1214(a)(3). *See White*, 63 M.S.P.R. at 94; *Geyer*, 63 M.S.P.R. at 1617. The appellant was advised of this requirement in multiple orders. AF, Tabs 4, 6, and 10. The

Board has held that the administrative judge is required to determine whether an appellant fulfilled the exhaustion requirement.[6] *See Costin v. Department of Health & Human Services*, 64 M.S.P.R. 517 (1994).

The appellant continually asserted that issuance of OSC's termination letter, advising her that she may have Board appeal rights, was sufficient to establish the Board's jurisdiction. AF, Tabs 9, 11, 13. That is simply erroneous. OSC stated only that appeal rights may exist with the Board and did not affirmatively grant such rights nor would OSC have the authority to do so. AF, Tab 1. The Board must independently resolve the issue of its jurisdiction over any and every case individually. The requirements for jurisdiction over an IRA appeal is set by Congress and, accordingly, the Board must ensure that they are met.

The appellant did not identify the disclosures at issue in her initial appeal but reserved the right to do so at a later time. AF, Tab 1. After several orders regarding the exhaustion requirement, the appellant did provide a copy of her OSC

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[6] I note for the record that the appellant refused to provide OSC's closure letter based on her interpretation of 5 U.S.C. § 1214(a)(2)(B). AF, Tabs 9 and 11. As I informed her, the Board had earlier held that, because it was required to by Congress to determine whether an appellant had exhausted her remedies before OSC with respect to whistleblowing claims, the Board would consider OSC's letter merely to assist in its determination regarding the exhaustion requirement but not as evidence of whistleblowing as prohibited by statute. AF, Tab 10. The appellant was ordered to submit the closure letter and she failed to comply with this order based on her assertion that, because the Whistleblower Protection Act had been amended in 1994, caselaw decided prior to the amendments was invalid. AF, Tab 11. The appellant's basis for her refusal to comply with a Board order was unfounded. Unless an amendment specifically changed the provision of the law in question, it is simply erroneous to suggest that an amendment of part of a statute renders all caselaw regarding all areas of the statute to be void. Nonetheless, based on my determination herein that the Board lacks jurisdiction over this appeal, I do not find it necessary to further address this issue.

complaint. AF, Tab 11. That complaint also did not identify the content of any disclosures but, rather, generally stated that "as a result of disclosing fraud, waste [and] mismanagement," she suffered retaliation by agency officials. *Id.* The appellant previously submitted copies of correspondence she provided to OSC. AF, Tab 9. In her letter of January 11, 2000, and its attachment,[7] as well as the other correspondence appellant drafted to OSC, the appellant discusses alleged improprieties in agency policies and procedures but she does not identify any specific protected disclosures that she made to any agency officials.[8] *Id.* Thus, I find that the appellant has failed

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[7] The appellant's attachment is a "timeline" which lists activity between her and agency officials. AF, Tab 9. It specifies discussions she had with agency officials regarding a "VDP Program" and other issues but it does not specify any alleged disclosures. *Id.* As noted above, discussion or disagreement with supervisors over job-related activities, especially those made to supervisors and not to authorities in a position to correct fraudulent or illegal activity, are not disclosures protected by the WPA. *See Willis v. Department of Agriculture*, 141 F.3d 1139 (Fed Cir. 1998). I note that, in her submissions to the Board, the appellant provided a document she prepared which specifically lists the alleged protected disclosures she made. Many of them she characterizes as a disclosures of "fraud, gross mismanagement, and abuse of authority." AF, Tab 9, Exhibit 1. However, there is no showing that these allegations were raised to OSC as protected disclosures. More importantly, these alleged disclosures all occurred prior to the appellant's termination with the agency and, as discussed at length herein, are barred by the settlement agreement between the parties.

[8] I note that, in her attachment to this letter, on page 8, the appellant indicated that, on June 4, 1997, she withdrew her IG complaint, presumably containing some or all of the appellant's disclosures, in light of the settlement agreement. AF, Tab 9. It is not possible to determine from the appellant's submissions whether all of her disclosures were contained in her IG complaint, but, if so, that also could serve to deprive the Board of jurisdiction over this matter.

to establish that she met the exhaustion requirement found at 5 U.S.C. § 1214(a)(3).[9]

For all of the above reasons, I find that the appellant has failed to make the required showing that the Board has jurisdiction over this appeal and, consequently, that the appeal must be dismissed. Further, although she requested a hearing, the appellant has failed to make specific allegations of fact which, if proven, could establish a prima facie case of Board jurisdiction. *See Dumas*, 789 F.2d at 894; *Manning*, 742 F.2d at 1428; *Ferdon*, 60 M.S.P.R. at 325. Consequently, the appellant's request for a hearing is denied.[10]

DECISION

The appellant's request for corrective action is DISMISSED.

FOR THE BOARD:

/s/ Sherry A. Armstrong
SHERRY A. ARMSTRONG
Administrative Judge

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[9] As discussed at length herein, it is my determination that the Board lacks jurisdiction to review any allegations concerning employment issues which could have been brought prior to execution of her settlement agreement with the agency on June 3, 1997. However, even if the appellant's allegations concerning activities which occurred prior to execution of the settlement agreement were properly before the Board in an IRA appeal, the appellant has failed to present a prima facie case of Board jurisdiction because she failed to establish that she met the exhaustion requirement found at 5 U.S.C. § 1214(a)(3) for the same reasons as stated herein.

[10] The appellant's pending motions to seal the record and to compel discovery are hereby moot in light of this decision.

NOTICE TO APPELLANT

This initial decision will become final on AUG 10 2000, unless a petition for review is filed by that date or the Board reopens the case on its own motion. This is an important date because it is usually the last day on which you can file a petition for review with the Board. However, if this initial decision is received by you more than 5 days after the date of issuance, you may file a petition for review within 30 days after the date you actually receive the initial decision. The date on which the initial decision becomes final also controls when you can file a petition for review with the Court of Appeals for the Federal Circuit. The paragraphs that follow tell you how and when to file with the Board or the federal court. These instructions are important because if you wish to file a petition, you must file it within the proper time period.

BOARD REVIEW

You may request Board review of this initial decision by filing a petition for review. Your petition, with supporting evidence and argument, must be filed with:

The Clerk of the Board
Merit Systems Protection Board
1120 Vermont Avenue, NW., Room 806
Washington, DC 20419

If you file a petition for review, the Board will obtain the record in your case from the administrative judge and you should not submit anything to the Board that is already part of the record. Your petition must be postmarked, faxed, or hand-delivered no later than the date this initial decision becomes final, or if this initial decision is received by you more than 5 days after the date of issuance, 30 days after the date you actually receive the initial decision. If you fail to provide a statement with your petition that you have either mailed, faxed, or hand-delivered a copy of your petition to the agency, your petition will be rejected and returned to you.

JUDICIAL REVIEW

If you are dissatisfied with the Board's final decision, you may file a petition with:

The United States Court of Appeals
for the Federal Circuit
717 Madison Place, NW.
Washington, DC 20439

You may not file your petition with the court before this decision becomes final. To be timely, your petition must be *received* by the court no later than 60 calendar days after the date this initial decision becomes final.

NOTICE TO AGENCY/INTERVENOR

The agency or intervenor may file a petition for review of this initial decision in accordance with the Board's regulations.

U.S. OFFICE OF SPECIAL COUNSEL
1730 M Street, N.W., Suite 300
Washington, D.C. 20036-4505

March 10, 2000

Ms. Jane S. Weaver
2001 N. Adams #436
Arlington, VA 22201

Re: OSC File No. MA-99-2026

Dear Ms. Weaver:

The purpose of this letter is to notify you that you have a right to seek corrective action from the Merit Systems Protection Board (MSPB). As we informed you in our closure letter of this date, we have terminated our inquiry into your allegations. Because you alleged that you were the victim of the prohibited personnel practice described in 5 U.S.C. § 2302(b)(8), commonly called reprisal for whistleblowing, you may have the following rights.

You may seek corrective action from the MSPB under the provisions of 5 U.S.C. §§ 1214(a)(3) and 1221 (individual right of action) for any personnel action taken or proposed to be taken against you because of a protected disclosure that was the subject of your complaint to this office. You may file a request for corrective action with the MSPB within 65 days after the date of this letter.

The Merit Systems Protection Board regulations concerning rights to file an individual right of action with the Board can be found at 5 C.F.R., parts 1201-1206 and 1209. If you choose to file such an appeal you should submit this letter to the Board as part of your appeal.

Sincerely,

/s/ Francisco J. Ruben
FRANCISCO J. RUBEN
Attorney, Complaints
Examining Unit

TITLE 5—UNITED STATES CODE

CHAPTER 12—MERIT SYSTEMS PROTECTION BOARD, OFFICE OF SPECIAL COUNSEL, AND EMPLOYEE RIGHT OF ACTION

Section 1201. Appointment of members of the Merit Systems Protection Board

The Merit Systems Protection Board is composed of 3 members appointed by the President, by and with the advice and consent of the Senate, not more than 2 of whom may be adherents of the same political party. The members of the Board shall be individuals who, by demonstrated ability, background, training, or experience are especially qualified to carry out the functions of the Board.

No member of the Board may hold another office or position in the Government of the United States, except as otherwise provided by law or at the direction of the President. The Board shall have an official seal which shall be judicially noticed. The Board shall have its principal office in the District of Columbia and may have field offices in other appropriate locations.

Note:

WHISTLEBLOWER PROTECTION; CONGRESSIONAL STATEMENT OF FINDINGS AND PURPOSE

Section 2 of Pub. L. 101-12 provided that:

> "(a) Findings.—The Congress finds that—
>
> > "(1) Federal employees who make disclosures described in section 2302(b)(8) of title 5, United States Code, serve the public interest by assisting in the elimination of fraud, waste, abuse, and unnecessary Government expenditures;

"(2) protecting employees who disclose Government illegality, waste, and corruption is a major step toward a more effective civil service; and

"(3) in passing the Civil Service Reform Act of 1978 (Pub. L. 95-454, see Tables for classification), Congress established the Office of Special Counsel to protect whistleblowers (those individuals who make disclosures described in such section 2302(b)(8)) from reprisal.

"(b) Purpose.—The purpose of this Act (see Short Title of 1989 Amendment note above) is to strengthen and improve protection for the rights of Federal employees, to prevent reprisals, and to help eliminate wrongdoing within the Government by—

"(1) mandating that employees should not suffer adverse consequences as a result of prohibited personnel practices; and

"(2) establishing—

"(A) that the primary role of the Office of Special Counsel is to protect employees, especially whistleblowers, from prohibited personnel practices;

"(B) that the Office of Special Counsel shall act in the interests of employees who seek assistance from the Office of Special Counsel; and

"(C) that while disciplining those who commit prohibited personnel practices may be used as a means by which to help accomplish that goal, the protection of individuals who are the subject of prohibited personnel practices remains the paramount consideration."

Section 1214. Investigation of prohibited personnel practices; corrective action

(a)(1)(A) The Special Counsel shall receive any allegation of a prohibited personnel practice and shall investigate the allegation to the extent necessary to determine whether there are reasonable grounds to believe that a prohibited personnel practice has occurred, exists, or is to be taken.

(B) Within 15 days after the date of receiving an allegation of a prohibited personnel practice under paragraph (1), the Special Counsel shall provide written notice to the person who made the allegation that—

(i) the allegation has been received by the Special Counsel; and

(ii) shall include the name of a person at the Office of Special Counsel who shall serve as a contact with the person making the allegation.

(C) Unless an investigation is terminated under paragraph (2), the Special Counsel shall—

(i) within 90 days after notice is provided under subparagraph (B), notify the person who made the allegation of the status of the investigation and any action taken by the Office of the Special Counsel since the filing of the allegation;

(ii) notify such person of the status of the investigation and any action taken by the Office of the Special Counsel since the last notice, at least every 60 days after notice is given under clause (i); and

(iii) notify such person of the status of the investigation and any action taken by the Special Counsel at such time as determined appropriate by the Special Counsel.

(D) No later than 10 days before the Special Counsel terminates any investigation of a prohibited personnel practice, the Special Counsel shall provide a written status report to the person who made the allegation of the proposed findings of fact and legal conclusions. The person may submit written comments about the report to the Special Counsel. The Special Counsel shall not be required to provide a subsequent written status report under this subparagraph after the submission of such written comments.

(2)(A) If the Special Counsel terminates any investigation under paragraph (1), the Special Counsel shall prepare and transmit to any person on whose allegation the investigation was initiated a written statement notifying the person of—

(i) the termination of the investigation;

(ii) a summary of relevant facts ascertained by the Special Counsel, including the facts that support, and the facts that do not support, the allegations of such person;

(iii) the reasons for terminating the investigation; and

(iv) a response to any comments submitted under paragraph (1)(D).

(B) A written statement under subparagraph (A) may not be admissible as evidence in any judicial or administrative proceeding, without the consent of the person who received such statement under subparagraph (A).

(3) Except in a case in which an employee, former employee, or applicant for employment has the right to appeal directly to the Merit Systems Protection Board under any law, rule, or regulation, any such employee,

former employee, or applicant shall seek corrective action from the Special Counsel before seeking corrective action from the Board. An employee, former employee, or applicant for employment may seek corrective action from the Board under section 1221, if such employee, former employee, or applicant seeks corrective action for a prohibited personnel practice described in section 2302(b)(8) from the Special Counsel and—

(A)(i) the Special Counsel notifies such employee, former employee, or applicant that an investigation concerning such employee, former employee, or applicant has been terminated; and (ii) no more than 60 days have elapsed since notification was provided to such employee, former employee, or applicant for employment that such investigation was terminated; or

(B) 120 days after seeking corrective action from the Special Counsel, such employee, former employee, or applicant has not been notified by the Special Counsel that the Special Counsel shall seek corrective action on behalf of such employee, former employee, or applicant.

(4) If an employee, former employee, or applicant seeks a corrective action from the Board under section 1221, pursuant to the provisions of paragraph (3)(B), the Special Counsel may continue to seek corrective action personal to such employee, former employee, or applicant only with the consent of such employee, former employee, or applicant.

(5) In addition to any authority granted under paragraph (1), the Special Counsel may, in the absence of an allegation, conduct an investigation for the purpose of determining whether there are reasonable grounds to believe that a prohibited personnel practice (or a pattern of prohibited personnel practices) has occurred, exists, or is to be taken.

(b)(1)(A)(i) The Special Counsel may request any member of the Merit Systems Protection Board to order a stay of any personnel action for 45 days if the Special Counsel determines that there are reasonable grounds to believe that the personnel action was taken, or is to be taken, as a result of a prohibited personnel practice.

(ii) Any member of the Board requested by the Special Counsel to order a stay under clause (i) shall order such stay unless the member determines that, under the facts and circumstances involved, such a stay would not be appropriate. (iii) Unless denied under clause (ii), any stay under this subparagraph shall be granted within 3 calendar days (excluding Saturdays, Sundays, and legal holidays) after the date of the request for the stay by the Special Counsel.

(B) The Board may extend the period of any stay granted under subparagraph (A) for any period which the Board considers appropriate.

(C) The Board shall allow any agency which is the subject of a stay to comment to the Board on any extension of stay proposed under subparagraph (B).

(D) A stay may be terminated by the Board at any time, except that a stay may not be terminated by the Board—(i) on its own motion or on the motion of an agency, unless notice and opportunity for oral or written comments are first provided to the Special Counsel and the individual on whose behalf the stay was ordered; or (ii) on motion of the Special Counsel, unless notice and opportunity for oral or written comments are first provided to the individual on whose behalf the stay was ordered.

(2)(A)(i) Except as provided under clause (ii), no later than 240 days after the date of receiving an allegation of a prohibited personnel practice under paragraph (1), the

Special Counsel shall make a determination whether there are reasonable grounds to believe that a prohibited personnel practice has occurred, exists, or is to be taken.

(ii) If the Special Counsel is unable to make the required determination within the 240-day period specified under clause (i) and the person submitting the allegation of a prohibited personnel practice agrees to an extension of time, the determination shall be made within such additional period of time as shall be agreed upon between the Special Counsel and the person submitting the allegation.

(B) If, in connection with any investigation, the Special Counsel determines that there are reasonable grounds to believe that a prohibited personnel practice has occurred, exists, or is to betaken which requires corrective action, the Special Counsel shall report the determination together with any findings or recommendations to the Board, the agency involved and to the Office of Personnel Management, and may report such determination, findings and recommendations to the President. The Special Counsel may include in the report recommendations for corrective action to be taken.

(C) If, after a reasonable period of time, the agency does not act to correct the prohibited personnel practice, the Special Counsel may petition the Board for corrective action.

(D) If the Special Counsel finds, in consultation with the individual subject to the prohibited personnel practice, that the agency has acted to correct the prohibited personnel practice, the Special Counsel shall file such finding with the Board, together with any written comments which the individual may provide.

(E) A determination by the Special Counsel under this paragraph shall not be cited or referred to in any proceeding under this paragraph or any other administrative or judicial proceeding for any purpose, without the consent of the person submitting the allegation of a prohibited personnel practice.

(d)(1) If, in connection with any investigation under this subchapter, the Special Counsel determines that there is reasonable cause to believe that a criminal violation has occurred, the Special Counsel shall report the determination to the Attorney General and to the head of the agency involved, and shall submit a copy of the report to the Director of the Office of Personnel Management and the Director of the Office of Management and Budget.

(2) In any case in which the Special Counsel determines that there are reasonable grounds to believe that a prohibited personnel practice has occurred, exists, or is to be taken, the Special Counsel shall proceed with any investigation or proceeding unless—

(A) the alleged violation has been reported to the Attorney General; and

(B) the Attorney General is pursuing an investigation, in which case the Special Counsel, after consultation with the Attorney General, has discretion as to whether to proceed.

(e) If, in connection with any investigation under this subchapter, the Special Counsel determines that there is reasonable cause to believe that any violation of any law, rule, or regulation has occurred other than one referred to in subsection (b) or (d), the Special Counsel shall report such violation to the head of the agency involved. The Special Counsel shall require, within 30 days after the receipt of the report by the agency, a certification by the head of the agency which states—

(1) that the head of the agency has personally reviewed the report; and

(2) what action has been or is to be taken, and when the action will be completed.

(f) During any investigation initiated under this subchapter, no disciplinary action shall be taken against any employee for any alleged prohibited activity under investigation or for any related activity without the approval of the Special Counsel.

(g) If the Board orders corrective action under this section, such corrective action may include—

(1) that the individual be placed, as nearly as possible, in the position the individual would have been in had the prohibited personnel practice not occurred; and

(2) reimbursement for attorney's fees, back pay and related benefits, medical costs incurred, travel expenses, and any other reasonable and foreseeable consequential damages.

Section 1221. Individual right of action in certain reprisal cases

(a) Subject to the provisions of subsection (b) of this section and subsection 1214(a)(3), an employee, former employee, or applicant for employment may, with respect to any personnel action taken, or proposed to be taken, against such employee, former employee, or applicant for employment, as a result of a prohibited personnel practice described in section 2302(b)(8), seek corrective action from the Merit Systems Protection Board.

(b) This section may not be construed to prohibit any employee, former employee, or applicant for employment from seeking corrective action from the Merit Systems Protection Board before seeking corrective action from the

Special Counsel, if such employee, former employee, or applicant for employment has the right to appeal directly to the Board under any law, rule, or regulation.

(c)(1) Any employee, former employee, or applicant for employment seeking corrective action under subsection (a) may request that the Board order a stay of the personnel action involved.

(2) Any stay requested under paragraph (1) shall be granted within 10 calendar days (excluding Saturdays, Sundays, and legal holidays) after the date the request is made, if the Board determines that such a stay would be appropriate.

(3)(A) The Board shall allow any agency which would be subject to a stay under this subsection to comment to the Board on such stay request.

(B) Except as provided in subparagraph (C), a stay granted under this subsection shall remain in effect for such period as the Board determines to be appropriate.

(C) The Board may modify or dissolve a stay under this subsection at any time, if the Board determines that such a modification or dissolution is appropriate.

(d)(1) At the request of an employee, former employee, or applicant for employment seeking corrective action under subsection (a), the Board shall issue a subpoena for the attendance and testimony of any person or the production of documentary or other evidence from any person if the Board finds that the testimony or production requested is not unduly burdensome and appears reasonably calculated to lead to the discovery of admissible evidence.

(2) A subpoena under this subsection may be issued, and shall be enforced, in the same manner as applies in the case of subpoenas under section 1204.

(e)(1) Subject to the provisions of paragraph (2), in any case involving an alleged prohibited personnel practice as described under section 2302(b)(8), the Board shall order such corrective action as the Board considers appropriate if the employee, former employee, or applicant for employment has demonstrated that a disclosure described under section 2302(b)(8) was a contributing factor in the personnel action which was taken or is to be taken against such employee, former employee, or applicant. The employee may demonstrate that the disclosure was a contributing factor in the personnel action through circumstantial evidence, such as evidence that—

(A) the official taking the personnel action knew of the disclosure; and

(B) the personnel action occurred within a period of time such that a reasonable person could conclude that the disclosure was a contributing factor in the personnel action.

(2) Corrective action under paragraph (1) may not be ordered if the agency demonstrates by clear and convincing evidence that it would have taken the same personnel action in the absence of such disclosure.

(f)(1) A final order or decision shall be rendered by the Board as soon as practicable after the commencement of any proceeding under this section.

(2) A decision to terminate an investigation under subchapter II may not be considered in any action or other proceeding under this section.

(g)(1)(A) If the Board orders corrective action under this section, such corrective action may include—(i) that the individual be placed, as nearly as possible, in the position the individual would have been in had the prohibited personnel practice not occurred; and (ii) back pay and related benefits, medical costs incurred, travel expenses, and any other reasonable and foreseeable consequential changes.

(B) Corrective action shall include attorney's fees and costs as provided for under paragraphs (2) and (3).

(2) If an employee, former employee, or applicant for employment is the prevailing party before the Merit Systems Protection Board, and the decision is based on a finding of a prohibited personnel practice, the agency involved shall be liable to the employee, former employee, or applicant for reasonable attorney's fees and any other reasonable costs incurred.

(3) If an employee, former em[p]loyee, or applicant for employment is the prevailing party in an appeal from the Merit Systems Protection Board, the agency involved shall be liable to the employee, former employee, or applicant for reasonable attorney's fees and any other reasonable costs incurred, regardless of the basis of the decision.

(h)(1) An employee, former employee, or appiicant for employment adversely affected or aggrieved by a final order or decision of the Board under this section may obtain judicial review of the order or decision.

(2) A petition for review under this subsection shall be filed with such court, and within such time, as provided for under section 7703(b).

(i) Subsections (a) through (h) shall apply in any proceeding brought under section 7513(d) if, or to the extent that, a prohibited personnel practice as defined in section 2302(b)(8) is alleged.

(j) In determining the appealability of any case involving an allegation made by an individual under the provisions of this chapter, neither the status of an individual under any retirement system established under a Federal statute nor any election made by such individual under any such system may be taken into account.

Section 2302. Prohibited personnel practices

(a)(1) For the purpose of this title, "prohibited personnel practice" means any action described in subsection (b).

(2) For the purpose of this section—

(A) "personnel action" means

(i) an appointment;

(ii) a promotion;

(iii) an action under chapter 75 of this title or other disciplinary or corrective action;

(iv) a detail, transfer or reassigment;

(v) a reinstatement;

(vi) a restoration;

(vii) a performance evaluation under chapter 43 of this title;

(ix) a decision concerning pay, benefits or awards, concerning education or training if the education or training may reasonably be expected to lead to an appointment, promotion, performance evaluation, or other action described in this subparagraph;

(x) a decision to order psychiatric testing or examination; and

(xi) any other significant change in duties, responsibilities, or working conditions;

with respect to an employee in, or applicant for, a covered position in an agency, and in the case of an alleged prohibited personnel practice described in subsection(b)(8), an employee or applicant for employment in a Government corporation as defined in section 9101 of title 31;

. . .

(b) Any employee who has authority to take, direct others to take, recommend, or approve any personnel action, shall not, with respect to such authority—. . .

(8) take or fail to take, or threaten to take or fail to take, a personnel action with respect to any employee or applicant for employment because of—

(A) any disclosure of information by an employee or applicant which the employee or applicant reasonably believes evidences—

(i) a violation of any law, rule, or regulation, or

(ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety,

if such disclosure is not specifically prohibited by law and if such information is not specifically required by Executive order to be kept secret in the interest of national defense or the conduct of foreign affairs; or

(B) any disclosure to the Special Counsel, or to the Inspector General of an agency or another employee designated by the head of the agency to receive such disclosures, of information which the employee or applicant reasonably believes evidences - (i) a violation of any law, rule, or regulation, or (ii) gross mismanagement, a gross waste of funds, an abuse of authority, or a substantial and specific danger to public health or safety;

CODE OF FEDERAL REGULATIONS, TITLE 5

PART 1209—PRACTICES AND PROCEDURES FOR APPEALS AND STAY REQUESTS OF PERSONNEL ACTIONS ALLEGEDLY BASED ON WHISTLEBLOWING

Revised as of January 1, 2000

Subpart A—Jurisdiction and Definitions

Sec. 1209.1 Scope.

This part governs any appeal or stay request filed with the Board by an employee, former employee, or applicant for employment where the appellant alleges that a personnel action defined in 5 U.S.C. 2302(a)(2) was threatened, proposed, taken, or not taken because of the appellant's whistleblowing activities. Included are individual right of action appeals authorized by 5 U.S.C. 1221(a), appeals of otherwise appealable actions allegedly based on the appellant's whistleblowing activities, and requests for stays of personnel actions allegedly based on whistleblowing.

Sec. 1209.2 Jurisdiction.

(a) Under 5 U.S.C. 1214(a)(3), an employee, former employee, or applicant for employment may appeal to the Board from agency personnel actions alleged to have been threatened, proposed, taken, or not taken because of the appellant's whistleblowing activities.

(b) The Board exercises jurisdiction over:

(1) Individual right of action appeals. These are authorized by 5 U.S.C. 1221(a) with respect to personnel actions listed in Sec. 1209.4(a) of this part that are allegedly threatened, proposed, taken, or not taken because of the appellant's whistleblowing activities. If the action is not otherwise directly appealable to the Board, the appellant must seek corrective action from the Special Counsel before appealing to the Board.

Example: Agency A gives Mr. X a performance evaluation under 5 U.S.C. chapter 43 that rates him as "minimally satisfactory." Mr. X believes that the agency has rated him "minimally satisfactory" because of his whistleblowing activities. Because a performance evaluation is not an otherwise appealable action, Mr. X must seek corrective action from the Special Counsel before appealing to the Board or before seeking a stay of the evaluation. If Mr. X appeals the evaluation to the Board after the Special Counsel proceeding is terminated or exhausted, his appeal is an individual right of action appeal.

(2) Otherwise appealable action appeals. These are appeals to the Board under laws, rules, or regulations other than 5 U.S.C. 1221(a) that include an allegation that the action was based on the appellant's whistleblowing activities. The appellant may choose either to seek corrective action from the Special Counsel before appealing to the Board or to appeal directly to the Board. (Examples of such otherwise appealable actions are listed in 5 CFR 1201.3 (a)(1) through (a)(19).)

Example: Agency B removes Ms. Y for alleged misconduct under 5 U.S.C. 7513. Ms. Y believes that the agency removed her because of her whistleblowing activities. Because the removal action is appealable to the Board under some law, rule or regulation other than 5 U.S.C.1221(a), Ms. Y may choose to file an appeal with the Board without first seeking corrective action from the Special Counsel or to seek corrective action from the Special Counsel and then appeal to the Board

(3) Stays. Where the appellant alleges that a personnel action was or will be based on whistleblowing, the Board may, upon the appellant's request, order an agency to suspend that action.

Sec. 1209.3 Application of 5 CFR part 1201.

Except as expressly provided in this part, the Board will apply subparts A, B, C, E, F, and G of 5 CFR part 1201 to appeals and stay requests governed by this part. The Board will apply the provisions of subpart H of part 1201 regarding awards of attorney fees and consequential damages under 5 U.S.C. 1221(g) to appeals governed by this part.

[55 FR 28592, July 12, 1990, as amended at 62 FR 17048, Apr. 9, 1997]

Sec. 1209.4 Definitions.

(a) Personnel action means, as to individuals and agencies covered by 5 U.S.C. 2302:

(1) An appointment;

(2) A promotion;

(3) An adverse action under chapter 75 of title 5, United States Code or other disciplinary or corrective action;

(4) A detail, transfer, or reassignment;

(5) A reinstatement;

(6) A restoration;

(7) A reemployment;

(8) A performance evaluation under chapter 43 of title 5, United States Code;

(9) A decision concerning pay, benefits, or awards, or concerning education or training if the education or training may reasonably be expected to lead to an appointment, promotion, performance evaluation, or other personnel action;

(10) A decision to order psychiatric testing or examination; or

(11) Any other significant change in duties, responsibilities, or working conditions.

(b) Whistleblowing is the disclosure of information by an employee, former employee, or applicant that the individual reasonably believes evidences a violation of law, rule, or regulation, gross mismanagement, gross waste of funds, abuse of authority, or substantial and specific danger to public health or safety. It does not include a disclosure that is specifically prohibited by law or required by Executive order to be kept secret in the interest of national defense or foreign affairs, unless such information is disclosed to the Special Counsel, the Inspector General of an agency, or an employee designated by the head of the agency to receive it.

(c) Contributing factor means any disclosure that affects an agency's decision to threaten, propose, take, or not take a personnel action with respect to the individual making the disclosure.

(d) Clear and convincing evidence is that measure or degree of proof that produces in the mind of the trier of fact a firm belief as to the allegations sought to be established. It is a higher standard than "preponderance of the evidence" as defined in 5 CFR 1201.56(c)(2).

[55 FR 28592, July 12, 1990, as amended at 62 FR 17048, Apr. 9, 1997]

Subpart B—Appeals

Sec. 1209.5 Time of filing.

(a) Individual right of action appeals. The appellant must seek corrective action from the Special Counsel before appealing to the Board. Where the appellant has sought corrective action, the time limit for filing an appeal with the

Board is governed by 5 U.S.C. 1214(a)(3). Under that section, an appeal must be filed:

(1) No later than 65 days after the date of issuance of the Office of Special Counsel's written notification to the appellant that it was terminating its investigation of the appellant's allegations or, if the appellant shows that the Special Counsel's notification was received more than 5 days after the date of issuance, within 60 days after the date the appellant received the Special Counsel's notification; or,

(2) If the Office of Special Counsel has not notified the appellant that it will seek corrective action on the appellant's behalf within 120 days of the date of filing of the request for corrective action, at any time after the expiration of 120 days.

(b) Otherwise appealable action appeals. The appellant may choose either to seek corrective action from the Special Counsel before appealing to the Board or to file the appeal directly with the Board. If the appellant seeks corrective action from the Special Counsel, the time limit for appealing is governed by paragraph (a) of this section. If the appellant appeals directly to the Board, the time limit for filing is governed by 5 CFR 1201.22(b).

(c) Appeals after a stay request. Where an appellant has filed a request for a stay with the Board without first filing an appeal of the action, the appeal must be filed within 30 days after the date the appellant receives the order ruling on the stay request. Failure to timely file the appeal will result in the termination of any stay that has been granted unless a good reason for the delay is shown.

[55 FR 28592, July 12, 1990, as amended at 59 FR 31110, June 17, 1994; 62 FR 59993, Nov. 6, 1997]

Sec. 1209.6 Content of appeal; right to hearing.

(a) Content. Only an appellant, his or her designated representative, or a party properly substituted under 5 CFR 1201.35 may file an appeal. Appeals may be in any format, including letter form, but must contain the following:

(1) The nine (9) items or types of information required in 5 CFR 1201.24 (a)(1) through (a)(9);

(2) Where the appellant first sought corrective action from the Special Counsel, evidence that the appeal is timely filed;

(3) The name(s) and position(s) held by the employee(s) who took the action(s), and a chronology of facts concerning the action(s);

(4) A description of the appellant's disclosure evidencing whistleblowing as defined in Sec. 1209.4(b) of this part; and

(5) Evidence or argument that:

(i) The appellant was or will be subject to a personnel action as defined in Sec. 1209.4(a) of this part, or that the agency has threatened to take or not to take such a personnel action, together with specific indications giving rise to the appellant's apprehensions; and

(ii) The personnel action was or will be based wholly or in part on the appellant's whistleblowing, as described in Sec. 1209.4(b) of this part.

(b) Right to hearing. An appellant has a right to a hearing.

(c) Timely request. The appellant must submit any request for a hearing with the appeal, or within any other time period the judge sets for that purpose. If the appellant does not make a timely request for a hearing, the right to a hearing is waived.

Sec. 1209.7 Burden and degree of proof.

(a) Subject to the exception stated in paragraph (b) of this section, in any case involving a prohibited personnel practice described in 5 U.S.C. 2302(b)(8), the Board will order appropriate corrective action if the appellant shows by a preponderance of the evidence that a disclosure described under 5 U.S.C. 2302(b)(8) was a contributing factor in the personnel action that was threatened, proposed, taken, or not taken against the appellant.

(b) However, even where the appellant meets the burden stated in paragraph (a) of this section, the Board will not order corrective action if the agency shows by clear and convincing evidence that it would have threatened, proposed, taken, or not taken the same personnel action in the absence of the disclosure.

FEDERAL RULES OF CRIMINAL PROCEDURE

Rule 6. The Grand Jury

(e) Recording and Disclosure of Proceedings.

. . .

(2) General Rule of Secrecy. A grand juror, an interpreter, a stenographer, an operator of a recording device, a typist who transcribes recorded testimony, an attorney for the government, or any person to whom disclosure is made under paragraph (3)(A)(ii) of this subdivision shall not disclose matters occurring before the grand jury, except as otherwise provided for in these rules. No obligation of secrecy may be imposed on any person except in accordance with this rule. A knowing violation of Rule 6 may be punished as a contempt of court.

(3) Exceptions.

(A) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury, other than its deliberations and the vote of any grand juror, may be made to—

(i) an attorney for the government for use in the performance of such attorney's duty; and

(ii) such government personnel (including personnel of a state or subdivision of a state) as are deemed necessary by an attorney for the government to assist an attorney for the government in the performance of such attorney's duty to enforce federal criminal law.

(B) Any person to whom matters are disclosed under subparagraph (A)(ii) of this paragraph shall not utilize that grand jury material for any purpose other than assisting the attorney for the government in the performance of such attorney's duty to enforce federal criminal law. An attorney for the government shall promptly provide the district court, before which was impaneled the grand jury whose material has been so disclosed, with the names of the persons to whom such disclosure has been made, and shall certify that the attorney has advised such persons of their obligation of secrecy under this rule.

(C) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury may also be made—

(i) when so directed by a court preliminarily to or in connection with a judicial proceeding;

(ii) when permitted by a court at the request of the defendant, upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury;

(iii) when the disclosure is made by an attorney for the government to another federal grand jury; or

(iv) when permitted by a court at the request of an attorney for the government, upon a showing that such matters may disclose a violation of state criminal law, to an appropriate official of a state or subdivision of a state for the purpose of enforcing such law. If the court orders disclosure of matters occurring before the grand jury, the disclosure shall be made in such manner, at such time, and under such conditions as the court may direct.

If the court orders disclosure of matters occurring before the grand jury, the disclosure shall be made in such manner, at such time, and under such conditions as the court may direct.

(D) A petition for disclosure pursuant to subdivision (e)(3)(C)(i) shall be filed in the district where the grand jury convened. Unless the hearing is ex parte, which it may be when the petitioner is the government, the petitioner shall serve written notice of the petition upon (i) the attorney for the government, (ii) the parties to the judicial proceeding if disclosure is sought in connection with such a proceeding, and (iii) such other persons as the court may direct. The court shall afford those persons a reasonable opportunity to appear and be heard.

(E) If the judicial proceeding giving rise to the petition is in a federal district court in another district, the court shall transfer the matter to that court unless it can reasonably obtain sufficient knowledge of the proceeding to determine whether disclosure is proper. The court shall order transmitted to the court to which the matter is transferred the material sought to be disclosed, if feasible, and a written evaluation of the

need for continued grand jury secrecy. The court to which the matter is transferred shall afford the aforementioned persons a reasonable opportunity to appear and be heard.

(4) Sealed Indictments. The federal magistrate judge to whom an indictment is returned may direct that the indictment be kept secret until the defendant is in custody or has been released pending trial. Thereupon the clerk shall seal the indictment and no person shall disclose the return of the indictment except when necessary for the issuance and execution of a warrant or summons.

(5) Closed Hearing. Subject to any right to an open hearing in contempt proceedings, the court shall order a hearing on matters affecting a grand jury proceeding to be closed to the extent necessary to prevent disclosure of matters occurring before a grand jury.

(6) Sealed Records. Records, orders and subpoenas relating to grand jury proceedings shall be kept under seal to the extent and for such time as is necessary to prevent disclosure of matters occurring before a grand jury.